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Nos. 09-976, 09-977, 09-1012

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA, INC. ET AL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has devoted substantial resources to litigating constitutional and statutory cases over the last 30 years in support of the free enterprise system and in opposition to unlawful and excessive government regulation of business due to the detrimental effects such actions have on American businesses, workers, and consumers, as well as the economy as a whole. In particular, WLF has appeared as amicus curiae before this Court and lower federal courts (including the circuit and district courts in this case) in cases raising important constitutional issues—including First Amendment cases—and statutory questions.

The National Association of Manufacturers (the NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for amici provided counsel for all parties with notice of intent to file. Consent to file was granted; letters of consent have been lodged with the Court.

public about the vital role of manufacturing to America's economic future and living standards.

REASONS FOR GRANTING THE PETITION

The United States wanted to hold the tobacco industry accountable for what the government came to see as statements at odds with the emerging "consensus" on the health and safety of smoking. Having failed to legislate or regulate a basis for such accountability, the government decided to litigate.

To that end, it constructed an unprecedented civil fraud case against the tobacco industry predicated on a novel use of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. It used the federal fraud statutes to target the speech of industry members made during decades-long public debates over the health and safety of smoking by treating these members' statements and activities as a collective enterprise. In the process, the government trampled the First Amendment protections built into the fraud statutes, chiefly, the scienter and materiality requirements. The government never attempted to prove that any speaker had a specific fraudulent intent nor that the speech at issue was material to consumers. Yet, the district court endorsed the government's novel approach. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). And the Court of Appeals affirmed, compounding the district court's error by failing to "independently review the trial court's findings," thereby eliminating a key "additional safeguard responsive to First Amendment concerns." *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 621 (2003) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498-511 (1984)).

Amici write separately to explain how the legal and doctrinal shortcuts taken here have broad implications for free speech. Indeed, if allowed to stand, this case threatens to chill vast amounts of speech by myriad participants in debate on issues of public concern, depriving particular speakers of their First Amendment rights and diminishing the diversity, intensity, and maybe even the accuracy of public discourse.

At bottom, this case concerns the extent to which the speech of corporate speakers is entitled to full First Amendment protection. The Court granted certiorari in *Nike v. Kasky*, 539 U.S. 654 (2003), in order to address this very issue. Its dismissal of that case has left important doctrinal questions unanswered and has fostered uncertainty about the First Amendment protection afforded to an entire class of speakers. The present case affords the Court the opportunity to complete its unfinished business in *Nike*. It also provides this Court a vehicle to resolve a circuit split about and reaffirm the constitutional necessity of independent review of fact-finding in fraud cases, which review is vital to protect the First Amendment. The Court should grant the petitions and provide clarity on these important questions.

I. THE D.C. CIRCUIT'S FLAWED APPROACH TO THE FIRST AMENDMENT WARRANTS THIS COURT'S REVIEW

Though the D.C. Circuit's opinion virtually ignores the First Amendment, this case centers on speech that is entitled to full First Amendment

protection. Public statements made about the health and safety effects of smoking made in newspaper articles, op-ed pieces, congressional testimony, press releases, and television appearances constitute speech on matters of public concern. *See* R.J. Reynolds Pet. at 16. Yet, the Court of Appeals treated this speech as commercial speech, affording it diminished—and ultimately no—First Amendment protection because it determined the speech to be fraudulent. Worse, in concluding that the speech at issue was fraudulent, the Court of Appeals allowed the government to evade the scienter and materiality requirements, which are essential for fraud statutes to accommodate the First Amendment.

A. Much of the Speech at Issue is Entitled to Full First Amendment Protection

The debate over cigarettes' health and safety "is one of the most controversial issues of our time. And, because the debate encompasses serious health concerns, it undoubtedly is one of the most important issues." Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1185 (1996). Indeed, "the addictive nature of cigarettes/nicotine, its health consequences and resulting public costs" are "matters of public concern." *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998); *see also Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Even the district court described this debate as a "national issue[] with . . . enormous economic, public health, commercial, and social ramifications." *Philip Morris USA, Inc.*, 449 F.Supp.2d at 31 n.3. Participating in this debate thus is one of the "classic forms of speech that lie at the heart of the First Amendment."

Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 377 (1997). Accordingly, speech on either side is entitled to full First Amendment protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the heirarchy of First Amendment values, and is entitled to special protection." (internal quotation marks omitted)).

The particular modes of speech principally at issue—newspaper articles, op-eds, congressional testimony, press releases, and television appearances, largely responding to public criticism and proposed government regulation—also are traditionally protected. *See* R.J. Reynolds Pet. at 16; *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding a paid editorial advertisement fully protected speech because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on . . . matters of the highest public interest and concern").

The Court of Appeals ignored the nature of this speech as fully protected, seemingly because the speakers had an economic motive for their communications.[2] But economic motive is insufficient

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[2] Although the Court of Appeals did not explicitly label the speech "commercial," it is clear the court treated it as such, because it rejected the Petitioners' First Amendment arguments solely on the grounds that the speech was (in the court's view) fraudulent. First Amendment jurisprudence makes clear that this is a sufficient ground to punish commercial speech, *see Madigan*, 538 U.S. at 612 ("[T]he First Amendment does not shield fraud."), but not fully protected speech, which—even if false—is entitled to "breathing space" to

to transform fully protected speech into commercial speech. *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010) ("First Amendment protection extends to corporations."); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) ("[T]he fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.").

The D.C. Circuit failed to address and carefully review the First Amendment implications of the speech on which RICO liability was predicated. In so doing, it blurred the distinction between commercial speech and speech on matters of public concern, and undermined the protections of the First Amendment.

B. The Decision Below Eliminates the Constraining Features that Allow Fraud Statutes to Co-Exist with the First Amendment

Because fraud statutes implicate constitutionally protected speech, this Court has placed "limits on the policing of fraud when it cuts too far into other protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1851 n.2 (2008) (Souter, J., dissenting); *see, e.g., Madigan*, 538 U.S. at 620; *see also* Brief for United States as *Amicus Curiae* Supporting

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ensure the vindication of First Amendment rights. *See New York Times Co.*, 376 U.S. at 271-72 (noting that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive" (internal quotation and alteration omitted)).

Petitioners at 20, *Nike*, 539 U.S. 654 (2003) ("U.S. *Nike* Brief") (highlighting "the constraining features that have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud"). Here, however, the government and lower courts disregarded these safeguards, principally the requirements of specific fraudulent intent and materiality.

To prove specific intent, a court must "look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement." Petition Appendix of U.S. ("Pet. App.") 29a. This standard recognizes that a company—as opposed to an individual—can never entirely know what information it possesses. *See New York Times Co.*, 376 U.S. at 287 ("The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false . . . ."). By ensuring that a company will not be liable for its unintentionally erroneous statements, the specific intent requirement affords proper "breathing space" to speak. *Id.* at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." (internal quotation marks and alterations omitted)). Without this breathing space, a company might withhold valuable information for fear of liability, depriving the public of important perspective and information.[3]

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[3] *See* Charles H. Moellenberg, Jr. and Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech From Tort Liability*, 70 U. PITT. L. REV. 555, 586 (2009) ("That the research was funded by a corporation does not make the results of good, well-reasoned research less

While the panel below recited the proper specific intent standard, the government never attempted to satisfy it. Indeed, the government stated that it would not offer proof that any "particular representative [of Defendants] knew or believed [a] statement to be false" because such proof was "immaterial." R.J. Reynolds Pet. at 23. Instead, the government proceeded under a novel "collective intent" theory approved by the district court, asserting that its "proof will rest on the collective knowledge of the defendants' corporations' . . . representatives," which can be "imputed to the corporation-principal." *Id.* The Court of Appeals questioned the government's "dubious . . . 'collective intent' theory," but nevertheless inferred individual officers' intent through a strained interpretation of the evidence. *Philip Morris*, 566 F.3d at 1122. Such inferences do not suffice. The "specific corporate employee must be found to have the [fraudulent] intent," *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 886 n.2 (6th Cir. 1990), but the district court never found a single person to have knowingly uttered a falsehood. *See* R.J. Reynolds Pet. at 23.

The government also failed to prove that any statements were "important to a reasonable person purchasing cigarettes." Pet. App. 39a. The materiality requirement flows from the government's

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valuable. A cure for cancer and the research underlying it would be just as beneficial to mankind if developed by a corporation . . . rather than a government or government-sponsored research.").

particular interest in protecting the integrity of transactions, and ensures that liability only attaches to speech that actually affects a consumer's decision Untethered from this legitimate government interest, the government or private parties might use fraud statutes to burden and disadvantage corporate speech and enhance their own. The First Amendment guards against this because, as the United States has explained, potential liability "based on no more than a threshold showing of materiality . . . unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits." U.S. *Nike* Brief at 23, 25.

In this case, there was "not a scintilla of evidence or any district court finding that any of the challenged statements (excluding 'lights') were 'important to a reasonable person purchasing cigarettes.'" R.J. Reynolds Pet. at 18. The Court of Appeals, lacking proof of materiality, was forced to speculate and dubiously conclude that "[t]he fact that Defendants continually denied any link between smoking and cancer suggests they themselves considered the matter material." Pet. App. 39a (citation omitted). But if courts can so easily infer materiality, the government's burden to prove fraud is substantially, and unconstitutionally, lightened. This relaxed materiality requirement may cause speakers to limit their public statements for fear that a plaintiff, prosecutor, or court will one day conclude a statement was material simply because it was made.

II. REVIEW IS WARRANTED BECAUSE THE D.C. CIRCUIT FAILED TO ENSURE MEANINGFUL REVIEW OF FACTS WITH CONSTITUTIONAL SIGNIFICANCE

In the district court, Petitioners repeatedly asserted that the First Amendment barred the government's efforts to impose RICO liability based on their public statements over the past six decades. The district court summarily dismissed all such assertions, finding that Petitioners' statements constituted fraud and that the First Amendment provides no protection for fraud. Slip Op. 886-889. Citing Fed. R. Civ. P. 52(a), the appeals court applied a highly deferential review standard to the district court's "fraud" findings and concluded that those findings should be affirmed because they were not "clearly erroneous." Pet. App. 12a, 46a, 49a, 61a, 64a. Accordingly, the appeals court rejected Petitioners' First Amendment claims because, it asserted, "it is well settled that the First Amendment does not protect fraud." *Id.* at 40a.

Review is warranted to determine whether the "clearly erroneous" standard applies to appellate review of findings that challenged speech falls into a category that is not entitled to First Amendment protection. As Petitioners point out, the appeals court's decision to apply the "clearly erroneous" standard directly conflicts with decisions from the Fifth, Tenth, and Eleventh Circuits. Philip Morris USA Pet. at 16, 19; Lorillard Pet. at 29. The conflict between the D.C. Circuit decisions and decisions of this Court, particularly *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984), provides

yet another reason this case warrants certiorari. *Bose* held that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 466 U.S. at 499 (quoting *New York Times Co.*, 376 U.S. at 284-86). The Court held that that obligation "is equally applicable" both on review of state court judgments (to which Rule 52(a) does not apply) and on review of federal court judgments (to which Rule 52(a) does apply). *Id.*

Following *Bose*, this Court and other federal courts have struggled to determine what, if any, deference should be accorded to a district court's findings that relate to the adjudication of First Amendment claims. For example, in 1989 the Court fully affirmed *Bose* but at the same time acknowledged that a trier of fact's "credibility determinations" regarding witnesses in First Amendment cases should be "reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Bose*, 466 U.S. at 499-500). But there is a clear conflict between *Bose* and the D.C. Circuit's categorical refusal here to conduct an independent review of the district court's finding that Petitioners' speech was fraudulent and thus entitled to no First Amendment protection. Review is particularly warranted where, as here, the result of such a categorical refusal is to deprive litigants of any meaningful appellate review of their First Amendment claims. There is serious doubt whether

such a rule meets an appellate court's obligation to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 286.

Although the D.C. Circuit simply ignored Petitioners' *Bose*-related arguments, the propriety of independent appellate review of key factual findings in First Amendment cases is well established. *Bose* explained that such review is constitutionally mandated and has long-standing antecedents in the common law:

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

Bose, 466 U.S. at 510-11.

The precise contours of the intersection between the requirement of independent appellate review and Rule 52(a)'s requirement that "findings of fact . . . must not be set aside unless clearly erroneous" have not yet been firmly established. But *Bose* was quite clear that there is one area in which the requirement

of independent appellate review should take precedence: review of "special facts that have been deemed to have constitutional significance." *Id.* at 505. After describing several categories of speech that traditionally have been deemed to merit no First Amendment protection (including fighting words, incitement to riot, obscenity, and child pornography), the Court explained the importance of careful appellate scrutiny of any assertion that challenged speech falls into one of those categories:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by

> triers of fact may inhibit the expression of protected ideas.

Id. at 504-05.

The D.C. Circuit explicitly recognized that the district court had held that Petitioners' speech fell into a category (fraudulent speech) that it deemed unprotected by the First Amendment. Pet. App. 40a. Despite that recognition, the appeals court held that all of the factual findings that supported the "fraud" determination were subject to review under Rule 52(a)'s "clearly erroneous" standard. Review is warranted because the appeals court's holding so very directly conflicts with the *Bose* holding described above.

Even in the context of commercial speech, the Court has looked to independent appellate review as an important safeguard against an unwarranted holding that the challenged speech merits no constitutional protection. *See Madigan*, 538 U.S. at 620-21 (reviewing a challenge to Illinois's efforts to regulate commercial—and allegedly fraudulent—solicitations and stating that Illinois's assertions that the defendant's speech was constitutionally unprotected because it was fraudulent would be subject to "[e]xacting proof requirement" at trial, and that "[a]s an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings"). Given that most of the speech at issue in this case is noncommercial in nature and that noncommercial speech is entitled to significantly greater First Amendment protection than is commercial speech,

the appeals court's adoption of a "clearly erroneous" standard of review cannot be squared with *Madigan*'s endorsement of independent appellate review of findings that speech is constitutionally unprotected because it is fraudulent.

The Court on several occasions has ruled that whether a libel defendant has acted with "actual malice" is a "special fact" that is deemed to have "constitutional significance"—and thus is subject to independent appellate review. *See, e.g., Harte-Hanks*, 491 U.S. at 685-86; *Bose*, 466 U.S. at 510-11. Similarly, whether a defendant's activities should be deemed noncommunicative in nature—and thus outside the ambit of the First Amendment—is a special fact subject to independent appellate review. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). And whether a defendant's speeches to civil rights supporters in Mississippi constitute "fighting words"—a category of speech to which the First Amendment does not apply—is also a special fact subject to independent appellate review. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

Even the dissenters in *Bose* were willing to accord a constitutional right to independent appellate review to "special facts" of constitutional significance "where 'a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" *Bose*, 466 U.S. at 517 (Rehnquist, J., dissenting) (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)). But the dissenters

viewed "actual malice" as a "pure historical fact[]," requiring "a determination as to the actual subjective state of mind of a particular person at a particular time," and thus subject to a "clearly erroneous" standard of review under Rule 52(a). *Id.* at 517 & n.1. The dissenters contrasted their view of "actual malice" in libel cases with factual findings regarding whether speech should be denied First Amendment protection because it qualifies as obscenity or fighting words; the dissenters argued that the latter situations "involve[d] the kind of mixed questions of fact and law which call for de novo review," because "appellate courts perhaps are just as competent as are triers of fact to make determinations about whether materials appeal to prurient interests" (obscenity) or "whether words are likely to provoke the average person to retaliation" (fighting words). *Id.*

Amici submit that the questions a trial court must answer to determine whether speech is fraudulent (thereby depriving it of First Amendment protection) would be deemed even by the *Bose* dissenters to be subject to independent appellate review as mixed questions of law and fact. For example, a fraud plaintiff must demonstrate, among other things, that any purported fraudulent statements were "material," *Neder v. United States*, 527 U.S. 1, 25 (1999), that is, of importance to a reasonable person in making a decision about a particular matter or transaction. *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996). Of course, the "reasonable person" does not actually exist; he is an imaginary person hypothesized by courts to assist in determining whether the

defendant's allegedly false statements had any real world significance, and how he would react is not an "historical fact." Because appellate courts are just as competent as triers of fact to determine how a hypothetical reasonable person would react to Petitioners' allegedly false statements, both the *Bose* majority and dissenters would agree—in conflict with the D.C. Circuit—that the district court's "fraud" determination is subject to independent appellate review. *See* A. Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L. J. 1427, 1456-58 (2001).

The Court has reserved a small role for Rule 52(a)'s "clearly erroneous" standard of review in cases involving "special facts" of constitutional significance. Where "the trier of fact has had the opportunity to observe the demeanor of the witness" and uses those observations to makes credibility determinations, appellate courts are to review those determinations under a "clearly erroneous" standard of review, even when the determinations qualify as "special facts." *Harte-Hanks*, 491 U.S. at 688 (internal quotation marks omitted); *Hurley*, 515 U.S. at 567. But credibility determinations could not have played a role in the district court's determination that Petitioners' speech was fraudulent, because the vast majority of the evidence before the district court consisted of documents. In sum, review is warranted because there is an irreconcilable conflict between the decisions of this Court and the D.C. Circuit's failure to accord independent appellate review to the district court's determination that Petitioners' speech was

fraudulent and thus not entitled to constitutional protection.

III. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO ANSWER THE QUESTIONS IT SOUGHT TO ADDRESS IN *NIKE V. KASKY.*

A. The Time is Right for this Court to Provide Needed Guidance and Ward off Threats to Public Discourse

The First Amendment questions presented by this case are critically important. They are precisely the same issues this Court intended to address when it granted certiorari in *Nike*. *See Nike*, 539 U.S. at 657 (granting certiorari on the question of "whether a corporation participating in a public debate may be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech'") (internal quotation marks omitted); *accord* U.S. *Nike* Brief at 1 (noting the case's "important questions respecting the relationship between the First Amendment and laws that prohibit commercial entities from making false statements in the marketplace respecting products and services").

This Court has recently reaffirmed that the speech of corporate actors may be entitled to full First Amendment Protection. *Citizens United*, 130 S. Ct. 876. Like political speech, speech on matters of public concern is "'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 904 (quoting *First Nat'l Bank of*

Boston v. Bellotti, 435 U.S. 765, 777 (1978)). This Court should reaffirm that corporations are vital participants in debates over matters of public concern. The government cannot eliminate the traditional accommodations between fraud statutes and the First Amendment simply because corporations are economically motivated.

Indeed, as the United States has cautioned, fraud statutes' "constraining features . . . have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud and regulate false advertising." U.S. *Nike* Brief at 20. But a "novel legal regime" which abandons the "traditional safeguards" like scienter, injury-in-fact, reliance, and materiality, "can chill protected speech." *Id.* at 6, 20. These safeguards "ensure that lawsuits, and the threat thereof, properly reflect society's strong interests in ensuring the integrity of transactions and compensating those suffering actual injury—not the plaintiff's desire to squelch an expression or viewpoint with which he happens to disagree." *Id.* at 13.

The Court should not wait any longer to address these important First Amendment issues. The threat to speech is real and "delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on." *Nike*, 539 U.S. at 667 (Breyer, J., dissenting). The same equities and values that warranted certiorari seven years ago in *Nike* obtain here today, perhaps with greater import. Here, the *government* has taken a position in the lengthy and contentious public debate over the health effects of

smoking, and subsequently sought to hold the losing side of that debate responsible for unprecedented liability under the federal fraud statutes, predicated on its participation in the very debates that the government has resolved against it. The message this sends is troubling and reinforces the importance of granting certiorari in this case.

B. If Allowed to Stand, this Case Will Chill Robust Debate on Important Matters of Public Concern

By blessing the government's novel approach, the Court of Appeals endorsed a boundless interpretation of the federal fraud statutes and a cramped view of the First Amendment that will chill public debate. Speakers who are economically motivated may self-censor for fear of ending up on the losing and disfavored end of some eventual "consensus." This will harm the quantity and quality of public debate.

This threat to public debate is not conjectural. A free press, one that serves the public welfare by "disseminat[ing] information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), cannot properly operate without access to corporate information. Journalists have previously indicated that, without access to the opinions, research, views, and information of companies or associations with an economic interest in matters of public debate—about product safety, the environmental and economic impact of an industry or proposed regulations—they cannot fulfill their mission. Indeed, unable to secure information

from sources chilled by the threat of liability, journalists have told this Court that they may be forced to write either "incomplete" and "untrustworthy" stories, or no story at all, as anything created may be too "one-sided" to be publishable. *See* Brief for Thirty-Two Leading Newspapers, Magazines, Broadcasters, and Media-Related Professional Associations as *Amicus Curiae* Supporting Petition for a Writ of Certiorari at 5, *Nike*, 539 U.S. 654.

Curtailing corporate speech thus amplifies one voice in a public debate over others, distorting the marketplace of ideas and leaving corporate actors unable to respond to public attack. Silencing companies faced with a barrage of public criticism "licens[es] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Thus, "the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not." *Nike*, 539 U.S. at 680 (Breyer, J., dissenting).[4] But matters of public concern need more voices, not fewer. "However pernicious an opinion may seem, we depend for its

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[4] Worse still, corporate speakers may have their speech subjugated to the speech of those with just as much of an economic motive. For example, product liability attorneys, some of whom incite unwarranted fears about product safety and efficacy, could attack without fear of response. *See* Brief for Product Liability Advisory Council, Inc. as *Amicus Curiae* Supporting Petitioners at 18, *Nike*, 539 U.S. 654 (detailing the numerous examples of product safety claims that were pushed forward in the media by the plaintiffs' bar and ultimately proven meritless).

correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

The decision below does harm not only to the speakers involved in the present case, but to speakers on any number of important matters of public concern. Those currently engaged in, for example, the heated debates over global warming—the fact of its existence, the nature of its causes, the accuracy of its science, and the appropriate remedies for it—must be free to voice their opinions. Amici submit that the passing of time and any resulting "scientific consensus" should render neither the solar company nor the oil company liable for the opinions it voices today. But the possibility of such liability is not far-fetched. Lawsuits against power and energy companies allegedly responsible for global warming are proceeding in federal courts around the country. *See, e.g.*, *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009); *Comer v. Murphy Oil Inc.*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 2010 WL 685796 (5th Cir. 2010); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir.). Given that the science behind the global warming movement has been called into serious question recently, *see Climate Emails Stoke Debate*, Wall St. J. (Nov. 23, 2009), lawsuits against the organizations and individuals behind this movement—who themselves often have a profit motive—are not far behind.

Likewise, those who publicly debate the medical necessity or health and safety effects of abortion are

at risk. Neither side is free from attacks related to their speech. Planned Parenthood has faced charges that its websites misled the public about the health effects of abortions, *see Bernardo v. Planned Parenthood Fed'n of America*, 115 Cal. App. 4th 322 (2004). At the same time, crisis pregnancy centers face the prospect of government regulation of their speech. *See, e.g.*, Press Release, *Montgomery County Maryland County Council, Councilmember Trachtenberg Introduces Resolution Requiring 'Pregnancy Centers' To Disclose Actual Scope of Their Services*, Nov. 10, 2009 (available at http://www.montgomerycountymd.gov/Apps/Council/PressRelease/PR_details.asp?PrID=6024) (describing Councilmembers' view that crisis pregnancy centers "often provide false and misleading information to women. . . . CPCs often tell clients that abortions make future pregnancy impossible; that abortions and oral contraceptives cause breast cancer; and that condoms are ineffective in preventing pregnancy and STDs."). If one side can someday claim a "scientific consensus," it might use that consensus to silence or punish those who have advocated differently, particularly if the other side's speech was economically motivated and thus not entitled to full protection.

One need not endorse the tobacco industry's past statements to recognize that a government-endorsed scientific or other "consensus" in the hands of a civil litigant as in *Nike*, or the government's RICO enforcer here, can be a powerful cudgel. That the government may disagree with the statements of corporate speakers does not justify diminished protections for the speech at issue. *See* Martin H.

Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 264 (1998) ("One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority."). The Framers long ago decided that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 717-18 (1931) (quoting Report on the Virginia Resolutions, Madison's Works, vol. iv, 544).

CONCLUSION

For the reasons set forth herein and in the Petitions, the Court should grant the writ of certiorari.

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